No. 21-____

IN THE

Supreme Court of the United States

REALGY, LLC,
Petitioner,

v.

ROBERTA LINDENBAUM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent,

and

UNITED STATES OF AMERICA,
Respondent-Intervenor.

On Petition for Writ of Certiorari to the United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

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December 8, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

Last year, this Court held that the TCPA's robocall restriction violated the First Amendment by excepting certain government speech. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335 (2020) (*AAPC*). The Court severed the exception—but did not directly address the impact severance has on lawsuits like this one, which seeks to impose liability for pre-severance speech, when the restriction was content-based.

The Sixth Circuit addressed that issue, becoming the first circuit to hold that speech could be penalized in an unconstitutionally discriminatory way. It stated that, because severance is always retroactive, the exception never existed and the restriction never perpetuated unequal treatment. This interpretation of severance creates *ex post facto* liability for favored speakers, a result Congress could not accomplish via severability clause. The Sixth Circuit surmised that favored speakers could not be sued for pre-severance speech because they lacked fair notice their speech was prohibited. Government speakers are thus shielded from past liability while other speakers are subject to punishment for past "political and other speech," re-creating the exact unequal treatment *AAPC* deemed unconstitutional and creating a circuit split on how severance operates. *AAPC*, 140 S. Ct. at 2341.

And the panel ruled after denying Petitioner's recusal motion, creating another circuit split.

The questions presented are:

1. Did this Court sever the government exception retroactively, and if so, is it permissible to reimpose the unequal treatment that this Court held "violates the First Amendment" via the fair notice doctrine?

2. Does 28 U.S.C. § 455 require recusal where a judge's ruling would directly benefit her in contingency fee litigation being prosecuted by a firm that bears the judge's name and which her spouse and son own, in the judge's own circuit?

PARTIES TO THE PROCEEDINGS

Realgy, LLC is the Petitioner here and was the Defendant-Appellee below.

Roberta Lindenbaum, individually and on behalf of all others similarly situated, is the Respondent here and was the Plaintiff-Appellant below.

The United States of America is the Respondent-Intervenor here and was the Intervenor-Appellant below.

CORPORATE DISCLOSURE STATEMENT

Realgy, LLC is a privately held company. No publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

Lindenbaum v. Realgy, LLC, *et al.*, No. 20-4252 (6th Cir.) (opinion issued and judgment entered on Sept. 9, 2021; mandate issued Oct. 4, 2021).

There are no additional proceedings in any court that are directly related to this case, although there are hundreds (if not thousands) of pending and future proceedings that will be impacted by the questions presented here.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

This case presents two questions of far-reaching importance regarding the First Amendment, severability doctrine (particularly, how it operates in conjunction with unique conduct-*permitting* provisions), retroactivity, and recusal. Review is required to provide much needed clarity, resolve two circuit splits and—most critically—close the constitutional loophole the Sixth Circuit's decision created. Review is particularly critical now, during an era when legislatures have attempted to draft laws to exploit other such loopholes and where the public increasingly views the judiciary as a political body.

The first question asks the Court to decide whether a historically discriminatory speech restriction can nonetheless be enforced to punish speech that occurred during the time it unconstitutionally discriminated. It also strikes at the core of how courts should analyze severance and the First Amendment. Here, Respondent haled Realgy into court on allegations it violated the TCPA's robocall restriction when it purportedly called her twice. *See* 47 U.S.C. § 227(b)(1)(A). Those calls occurred while the robocall restriction was, according to this Court, unconstitutionally content-discriminatory—while it impermissibly favored government speech "over political and other speech" because it contained an exception for certain government-favored speech. *AAPC*, 140 S. Ct. at 2341.

Realgy moved to dismiss. It argued that binding precedent from this Court prohibits imposing liability under a speech restriction that was, as a historical fact, unconstitutionally discriminatory at the time of the speech. Realgy also argued that *AAPC* severed the government debt exception prospectively, because using retroactive severance to treat the exception as a

nullity that never existed and never perpetrated real world harm is both constitutionally and logically untenable—just as it would be incoherent to state that severing a provision that rendered a criminal sentencing regime unconstitutional would cure all the harm that occurred under sentences imposed during the pre-severance regime.

Engaging in this type of legal fiction ignores that the discriminatory robocall restriction *in fact* existed and governed speech unequally. And, treating the severance as retroactive creates an additional, unsolvable problem. Because it would mean that the exemption government debt collectors relied on to make robocalls was never legally effective, it would impose crushing *ex post facto* liability—potentially criminal[1] in nature—for every call made by those collectors pursuant to the exemption that was on the books.

The Sixth Circuit disagreed. It held that liability can be imposed under an unconstitutionally discriminatory speech regime—but it did not address the authority Realgy cited from this Court that mandates a contrary conclusion. It took an absolutist (and erroneous) approach, declaring that severance is *always* retroactive. In doing so, it ignored: (a) this Court's pronouncement that severance should be prospective where constitutional concerns compel that Congress could only effect prospective severance via a severability clause, which is the source of the judiciary's power to sever; and (b) the test this Court set forth to make that determination—a test the Sixth Circuit did not apply. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017) (holding that "as the Government suggests, [the severed version of the statute] should

[1] *See* 47 U.S.C. § 501.

apply, prospectively" because applying it retroactively would create other constitutional problems that Congress could not lawfully enact by legislation). It then acknowledged that treating the amended robocall restriction as if it did not exist would subject government debt collectors to *ex post facto* liability for exempt speech in violation of Due Process.

The Sixth Circuit attempted to solve that dilemma by invoking fair notice—a doctrine that prohibits punishment without adequate notice of illegality. The Sixth Circuit reasoned that although favoring government speakers over others was the *exact same* disparate treatment *AAPC* found unconstitutional, creating disparate treatment via fair notice somehow allays First Amendment concerns. For the Sixth Circuit, fair notice is always speech neutral—even though the only way to tell whether the fair notice doctrine applies is to first evaluate the content of the speech at issue (whether it is government debt collection speech or something else). The Sixth Circuit also ignored that its conclusion would throw innocent government debt collectors to the wolves, forcing them to defend against trillions of dollars worth of class actions and argue, case by case, that the fair notice doctrine bars recovery.

Lindenbaum ignores binding First Amendment precedent, muddies severability doctrine beyond recognition, and provides a roadmap for legislative abuse. By enforcing unconstitutional speech regimes and declaring that severance is always retroactive such that it purportedly wipes away all constitutional harm that occurred during the time the statute was unconstitutional, *Lindenbaum* creates a constitutional loophole. It allows legislatures to pass discriminatory exceptions to speech restrictions—including abhorrent exceptions that favor a political party, race, or other category—

and then enforce those restrictions in a discriminatory way until this Court severs the exception. This injustice is laid bare by the necessary results of *Lindenbaum*'s analysis.

Consider the following example. Washington D.C. amends its time, place, and manner protesting restrictions to permit pro-choice protests during restricted hours. Two protesters—one pro-life and one pro-choice—are arrested under the amendment for protesting outside the White House after 11 pm. If *Lindenbaum* is correct, the pro-life protester's conviction must stand, even if the Supreme Court finds the exception unconstitutional and severs it from the statute. The pro-choice protester, on the other hand, is entirely immune from liability because he lacked fair notice that his conduct was illegal.

The law is clear that this type of constitutional bypass is incompatible with the First Amendment. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 107 n.2 (1972) (reversing conviction even though legislature severed unconstitutional provision because the Court must "[n]ecessarily[] . . . consider the facial constitutionality of the ordinance in effect when [the defendant] was arrested and convicted"); *R.A.V. v. St. Paul*, 505 U.S. 377, 396 (1992) (reinstating dismissal of charges for cross-burning because statute was content-discriminatory, regardless of fact that conduct could be prosecuted under another statute that was not content-discriminatory); *Sessions*, 137 S. Ct. at 1699 n.24 ("a defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity").

These decisions make clear that the constitutional harm of chilling speech cannot be undone by judicial

decree, which would ignore the here-and-now injury that has already occurred to the disfavored speaker. For example, if a government debt collector had been sued alongside Realgy in this case, she would have been immediately dismissed with prejudice under the exception that actually existed at the time. That speech discrimination—evidenced by the countless number of lawsuits faced by non-government debt collectors prior to *AAPC* while such collectors were immune—cannot be undone. The speech has already been chilled because the exception existed as a historical fact and people ordered their lives based on it. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020) (holding person subject to unconstitutional agency's power suffers from "here-and-now" injury despite subsequent severance of unconstitutional provision and remanding for consideration of "whether . . . [post-severance] ratification in fact occurred and whether, if so, it is legally sufficient to cure the constitutional defect"); *see also United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987 (2021) (remedy for constitutional harm that occurred pre-severance must be "tailored" to the constitutional harms). Because the consequences of the path taken by the Sixth Circuit are dire, *Lindenbaum* should be reviewed.

The second question concerns the circumstances under which a judge is required to recuse under 28 U.S.C. § 455 where she stands to personally benefit from the outcome of the case. Realgy sought recusal of Judge Branstetter Stranch, one of three judges on the Sixth Circuit panel, immediately upon learning that her husband and son are owners of a small, closely-held plaintiff's firm, Branstetter Stranch, that is actively prosecuting class action cases within the Sixth Circuit under the specific TCPA sub-sub-sub section challenged in *Lindenbaum* (the robocall

restriction), a practice that has netted millions in past contingency payouts to the firm. Though she would clearly and directly benefit financially from a ruling reversing the district court and permitting liability under the robocall restriction during the time it was discriminatory—thus permitting Branstetter Stranch to continue pursuing their pending TCPA class actions under the robocall restriction they currently had pending—Judge Branstetter Stranch elected to ignore the recusal statute. But Congress's mandate is clear: it ***requires*** recusal in "any proceeding in which a judge's impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

Emblematic of a disconcerting trend of judicial abdication toward mandatory recusal obligations, the panel brushed aside the facts at bar and conclusorily stated that "a reasonable, objective person would not question Judge Stranch's impartiality." App. 113a. The facts dictate otherwise, and if the passive ownership of a small amount of stock requires recusal, the circumstances presented in *Lindenbaum* surely do.

The question presented here—whether a judge must recuse when she stands to benefit personally and directly to the tune of hundreds of thousands or millions of dollars by ruling in a certain way—therefore also warrants review. Without such review, Realgy has no remedy and no way to ensure 28 U.S.C. § 455 is followed, given Judge Branstetter Stranch participated in deciding the motion to recuse her and there is no neutral appellate mechanism other than review by this Court.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 13 F. 4th 524 and reproduced at App. 114a-126a. The Sixth Circuit's order denying Realgy's motion seeking

recusal is unreported and reproduced at App 111-113. The district court's order granting Realgy's motion to dismiss is reported at 497 F. Supp. 3d 290 and reproduced at App. 1a-17a.

JURISDICTION

The Sixth Circuit issued its final opinion and judgment on September 9, 2021. Realgy did not petition for rehearing. The mandate issued on October 4, 2021. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.

The Fifth Amendment provides, in relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Cont. amend. V.

Article 1 of the U.S. Constitution provides, in relevant part: "No Bill of Attainder or *ex post facto* Law shall be passed." U.S. Const. Art. I, § 9, cl. 3.

The relevant provisions of the TCPA, 47 U.S.C. § 227, are reproduced at App. 128a-137a.

The relevant provisions of 28 U.S.C. § 455 are reproduced at App. 138a-141a.

STATEMENT OF THE CASE

1. Between 2015 and July 2020, Congress required companies like Realgy to curb their speech to comply with the TCPA's robocall restriction. Congress did not impose the same speech restriction on those who placed calls to collect government debts during that

period; rather, they were exempt from liability under a speech-permitting amendment to the robocall restriction. As a result of this disparity, companies like Realgy faced trillions of dollars in TCPA lawsuits and enforcement actions for the same speech that government debt collectors were permitted to engage in at will. Many of the would-be claims against the exempted government speakers are now forever barred by the TCPA's four-year statute of limitations, a speech inequity that can never be cured, because the government speakers were exempted for that period of time, whereas the private actors were repeatedly subject to suit.

2. In *AAPC*, this Court addressed a prospective challenge to the robocall restriction—specifically, whether the addition of the government debt exception to the TCPA's robocall restriction rendered the restriction unconstitutional such that it could not be enforced going forward. 140 S. Ct. at 2343, 2346-47. The opinion was fractured, but a majority explained the robocall restriction was an unconstitutional content-based speech restriction, when combined with the government debt exception, because the addition of the speech-permitting exception meant the restriction favored government speech "over political and other speech" in violation of the First Amendment. *Id.* at 2343, 2346-47.

Writing for a plurality, three members of the Court (Justices Kavanagh, Alito, and Chief Justice Roberts) then addressed how to remedy this unequal treatment problem going forward. *Id.* Recognizing that the "Court's "remedial preference . . . has been to salvage rather than destroy the rest of the law passed by Congress," the Court determined that the statute could be restored to constitutional health by severing

the government debt exception. *Id.* at 2350-5. Although that approach did not allow the *AAPC* petitioners to make calls going forward, it "fully address[ed]" the "unequal treatment" injury that was "at the heart of their suit," since their suit only sought prospective relief. *Id.* at 2355.

The Court did not specifically decide the impact of its decision on pending lawsuits like this one, where a plaintiff seeks to impose liability for calls made while the restriction was unconstitutionally discriminatory. *Id*. at 2355 n.12. Nor did the Court have occasion to address that question. The parties did not brief or argue the issue because the petitioners' challenge was prospective and there was no underlying litigation seeking to impose liability. *Id.*

Members of the Court nonetheless recognized that "shield[ing] only government debt collection calls from past liability under an admittedly unconstitutional law would wind up endorsing the very same kind of content discrimination we [the majority] say we are seeking to eliminate"—favoring government speech over political and other speech. *Id.* at 2365 (Gorsuch, J., joined by Thomas, J., concurring in part and dissenting in part).

3. Prior to *AAPC*, Respondent sued Realgy, alleging that it violated the robocall restriction after she received two calls without consent. App. 1a-2a, 120. All the calls allegedly occurred while the robocall restriction was unconstitutional. App. 1a-2a, 5a. Based on these allegations, Respondent claimed that she and the putative class members were entitled to $1,500 in treble damages for each call. App. 137a.

It is undisputed that had Respondent sued Realgy *and* a government debt collector for this same speech,

Respondent's claims against the debt collector would have been dismissed immediately with prejudice under the then-existing government debt exception.

4. Realgy moved to dismiss because the district court lacked subject matter jurisdiction to enforce the robocall restriction against Realgy, as *AAPC* deemed it unconstitutional prior to the prospective severance of the government debt exception. App. 5a-6a. In opposition, Respondent argued that *AAPC* only deemed the exception void *ab initio* and retroactively removed it as if it never existed. App. 6a. Since it was always unconstitutional and thus void, Respondent claimed, government debt collectors were never actually shielded from liability and thus are now liable for speech specifically exempted by Congress. App. 6a.

5. The district court agreed with Realgy and dismissed. App. 6a-16a. It noted that the only way to uphold this Court's "equal treatment" mandate under the First Amendment is to treat the favored and disfavored equally with respect to pre-severance speech. App. 16a. To do otherwise would (as Justice Gorsuch alluded in *AAPC*) perpetuate the same content discrimination the *majority* recognized and cured prospectively in *AAPC*. App. 16a. And because the Respondent's position endorses *ex post facto* liability (potentially criminal liability, *supra* n. 2) for government debt collectors, the district court reasoned, severance must apply prospectively to uphold the constitutional rights of not just Realgy, but government debt collectors themselves. As the district court noted, "[i]t would be an odd result to say the least if the judiciary could accomplish by severance that which Congress could not accomplish by way of amendment" (*i.e.*, retroactive liability for government debt collectors). App. 15a.

6. Respondent appealed. To the Sixth Circuit, she argued that *AAPC* only deemed the 2015 amendment unconstitutional—not the robocall restriction with the amendment, despite *AAPC*'s clear language to the contrary—and severed it retroactively, not prospectively. App. 120a-121a. She again argued that this meant the amendment was void *ab initio* such that it never legally existed, meaning that government debt-collectors could be liable under it for their previously exempt conduct. App. 120a-121a. But in an attempt to avoid the due process and *ex post facto* liability dilemma her position admittedly created, Respondent contended that government debt collectors would not be liable because of the fair notice doctrine: a doctrine that prohibits punishment without sufficient notice of illegality. App. 126a-127a. Thus, for speech made during 2015-2020, companies like Realgy could uniformly face liability for their speech while similarly situated government speakers would be uniformly exempt for theirs. In this manner, Respondent sought to re-impose, through the back door, the *exact same* discriminatory speech restriction that this Court just held unconstitutional: Everyone is liable for their speech except government debt collectors.

7. Realgy reiterated that Respondent's position was constitutionally untenable. Binding Supreme Court precedent makes clear that liability cannot be imposed under a speech restriction that was, as a historical fact, unconstitutionally content-based at the time of the speech, regardless of any subsequent severance, since the harm (including chilling of speech) cannot be undone. *Grayned*, 408 U.S. at 107 n.2. Engaging in the legal fiction that the robocall restriction never contained the exception would necessarily impose unconstitutional *ex post facto* liability on government debt collectors. App. 125a-126a. And attempting to

solve that constitutional problem by sparing government debt-collectors via fair notice would re-create the same unequal treatment *AAPC* held violated the First Amendment: "favor[ing] debt-collection speech over political and other speech." App. 121a; *AAPC*, 140 S. Ct. at 2343.

Several *amici*—including the ACLU and constitutional law professors, such as Erin Chemerinsky, supported Realgy. Br. for ACLU and Law Professors Supporting Appellant, *Lindenbaum v. Realgy, LLC*, 2021 WL 1163982 (6th Cir. Mar. 18, 2021). They agreed that Respondent's position was constitutionally untenable, because it countenanced the creation of a discriminatory speech regime whereby Congress could enact an exception to any speech restriction for favored groups and then enforce that restriction against disfavored speakers until the Supreme Court cures the law via severance. Even after severance, Congress's illegal purpose would be accomplished for the period the illegal law was on the books: government-favored speakers would be exempt during that period because they lacked fair notice their conduct was equally prohibited, and disfavored speakers would still be subject to crushing civil or criminal liability for the same speech.

8. After briefing, the Sixth Circuit released the names of the judges on the panel, two weeks before argument occurred. App. 23a, 111a. The panel included Judge Jane Branstetter Stranch. App. 111a. Realgy soon discovered that Judge Branstetter Stranch's spouse and son are owners of (and her daughter is also an attorney in) Branstetter Stranch & Jennings PLLC. Branstetter Stranch is a small, closely-held law firm—that was then (and is now) representing plaintiffs, including within the Sixth Circuit, seeking to impose

class-action liability under the robocall restriction, the exact same sub-sub-sub section at issue here. App. 20a-22a. Realgy moved to recuse Judge Stranch based on an obvious appearance of impropriety: Judge Stranch's husband and two children all work for a firm bearing her name that is currently prosecuting (and actively soliciting for) contingency fee litigation under the TCPA's robocall restriction, which lucrative litigation could have been fully or partially extinguished by a ruling in Realgy's favor. App. 20a-22a. Branstetter Stranch is located primarily in the Sixth Circuit, and it advertises its plaintiff's-side TCPA class action results on its website, noting prominently that it has achieved "multi-million-dollar settlements" in TCPA matters, which presumably resulted in significant payouts to the firm's partnership (and thus Judge Stranch's husband). App. 25a. The firm has filed at least four TCPA class actions since January 1, 2016, that specifically involve liability for calls under the robocall restriction, the exact provision at issue in this case. App. 21a. Two of these cases were pending when the *Lindenbaum* decision issued, and one is within the Sixth Circuit.

9. Realgy moved to recuse Judge Stranch based on the appearance of impropriety that her inclusion on the panel created, but the Sixth Circuit denied Realgy's motion. App. 111a. It did not dispute any of the facts underlying Realgy's motion but stated that no reasonable lay observer would question Judge Stranch's impartiality. App. 111a-114a.

10. The Sixth Circuit then, with Judge Stranch on the panel and having participated in deliberations for months, reversed the district court on the merits. It reasoned that because courts can only say what the law has always been, severance *always* operates retroactively—even where Congress could not accomplish

retroactive severance by severability clause. App. 122a-124a. And because severance always applies retroactively in an absolutist sense, the robocall restriction (with the amendment) did not ever legally exist. App. 122a-124a. Thus, the panel reached the legally fictive conclusion that there was no real content discrimination at the time of the speech at issue, even though millions of messages were stifled by the discrimination that actually did exist in the U.S. Code for five years. App. 124a-125a.

11. The Sixth Circuit also acknowledged that treating the Restriction as if it did not exist would subject government debt-collectors to unconstitutional liability for exempt speech, as Realgy contended. App. 125a. It reached two other conclusions to combat this problem. Though it asserted (incorrectly) that the issue was not before it, the panel first speculated that the fair notice doctrine might shield government debt collectors from liability. App. 125a-126a. It then concluded that imposing liability against a defendant for its speech but exempting government debt-collectors for theirs does not violate the First Amendment. App. 125a-126a. The panel reasoned that although favoring government speakers over others was the exact same unequal treatment the Supreme Court in *AAPC* found unconstitutional, applying the fair notice doctrine did not pose any First Amendment concerns. App. 125a-126a. For the Sixth Circuit, fair notice is always speech neutral—even though the only way to tell whether to even apply the fair notice doctrine is to first evaluate the content of the speech. App. 125a-126a.

REASONS FOR GRANTING THE PETITION

Granting this petition will give the Court an opportunity to clarify severability doctrine, address a Circuit split, and provide much needed guidance on

the standard for recusal. Both questions presented carry extraordinary consequences for free speech, unequal treatment, and the People's faith that the judiciary will act impartially and uphold Constitutional mandates.

The questions presented are independently worthy, and together they compel review. First, the Sixth Circuit's decision on the merits is deeply flawed and constitutionally untenable. The panel ignored binding precedent from this Court holding that content-discriminatory speech restrictions are unenforceable, regardless of subsequent severance. In fact, if the decision below stands, it would be the first instance a Circuit court has *ever* imposed liability under a discriminatory speech restriction without later being reversed by this Court. The decision endorses the creation of discriminatory speech regimes, and it re-creates the same unequal treatment the Court deemed unconstitutional in *AAPC* just last year.

Along the same lines, and most gravely, the Sixth Circuit's decision creates a roadmap for legislatures to sidestep the First Amendment. It permits them to enact statutory exceptions to speech restrictions that favor a political party, gender, or ideology and then enforce those laws against disfavored speakers until the Supreme Court cures the law via severance. From inception to the date of severance, favored speakers would be exempt because they lacked fair notice that their conduct was equally prohibited. Though this problem features prominently in Realgy's (and *amici*'s) briefing below, the Sixth Circuit's decision *does not even address* the constitutional loophole created by its decision. This Court's intervention is thus necessary to correct an egregious constitutional error and ensure

that the government is not given license to enact speech regimes that favor its preferred content.

Additionally, Court intervention is needed to clarify the circumstances in which a judge is required to recuse under 28 U.S.C. § 455 where she stands to benefit financially from her decision. Although § 455(a) "clearly mandates . . . a judge err on the side of caution and disqualify [her]self in a questionable case[,]" Judge Stranch's refusal to recuse here is a clear deviation from that standard. *Potashnick v. Port City Const. Co.*, 609 F. 2d 1101, 1112 (5th Cir. 1980). Any reasonable lay person would question her impartiality when made aware that both she and several immediate family members stand to reap a significant financial benefit from her ruling—a benefit far more substantial and immediate than ownership of a small amount of stock in a party, which unquestionably requires recusal. *See id.*

In sum, each of the questions presented merits review on its own. Reviewing both questions will allow the Court, in one case, to correct the injustice created by *Lindenbaum*, resolve a Circuit split as to each question, and provide long-needed clarity to severability doctrine and the recusal standard. The Court should grant review.

I. The Court Should Grant Certiorari to Ensure Compliance with this Court's First Amendment and Severance Jurisprudence.

The Sixth Circuit's decision contains several critical constitutional errors. The panel overlooked contrary precedent from this Court in declaring that severance always operates retroactively such that it erases all pre-severance constitutional harm, and when it held that Realgy can be held liable for alleged violations of

a discriminatory speech restriction. Intervention is needed to correct *Lindenbaum*'s disregard of precedent and remedy its consequences for free speech and legislative abuse.

Initially, *AAPC*'s severance of a conduct-*permitting* provision was not—and could not have been—retroactive, including because the judiciary cannot constitutionally accomplish by severance what Congress could not by a severability clause, which is the source of a court's power to sever in the first instance. *Lindenbaum* therefore represents a raw usurpation of power from the legislature because it arrogates to the judiciary a legislative power—creating *ex post facto* liability by retroactively eliminating a conduct-permitting provision—that the legislature does not itself possess.

And even assuming severance could operate retroactively in a purely legal sense, it cannot erase the constitutional harm that had already occurred, as this Court's precedents establish. Rather, a remedy must be fashioned to address that harm.

To this end, the remedy cannot be the application of fair notice to shield only government debt collectors from liability, because that: (a) re-recreates the exact discriminatory speech regime that this Court held "violates the First Amendment;" and (b) leaves government debt collectors to face billions in lawsuits, which they would have to defend one-by-one and attempt to convince the district court they lacked fair notice.

Thus, all paths lead back to the same result: Neither government debt collectors nor other speakers can be prosecuted under the restriction for 2015-20 speech. Any other conclusion would either blatantly violate separation of powers principles and due process, or it

would violate the core tenet of this Court's holding in *AAPC*, that the TCPA's unequal treatment based on the content of speech "violates the First Amendment."

Aside from being compelled by the majority ruling of *AAPC*, this is the only result consistent with and compelled by this Court's past First Amendment holdings, which are unanimous that liability cannot be imposed under a speech restriction during a time it was, as a historical fact, unconstitutionally discriminatory—regardless of whether it was fixed by severance (either retroactively or prospectively).

A. The Sixth Circuit's Holding that Severance Is Always Retroactive Conflicts with Supreme Court Precedent.

The panel's core premise is that severance always applies retroactively, even in the unique case of severing a conduct-*permitting* exception. This premise is incorrect and contradicted by recent Supreme Court precedent. Though the Sixth Circuit acknowledged that legislative intent is the "hallmark" of whether the judiciary may sever, it overlooked why that means *AAPC*'s severance of the government debt exception *must* apply prospectively, in this unique case involving the removal of a conduct-*permitting* exception. App. 123a.

This Court in *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994) held that a statute cannot impose liability retroactively absent "'clear, strong, and imperative' language" from Congress. *See also Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313 (1994). No such language exists in the TCPA's severability clause, which is where the judiciary derives power to sever. App. 128a-127a; *AAPC*, 140 S. Ct. at 2349. Thus, *Landraf* and *Rivers* compel the conclusion that

Congress did not intend severance to permit retroactive liability.

Nor could Congress have created retroactive liability if it wanted to—the Constitution prohibits it. Consider the following example to illustrate why. Suppose Congress had foreseen the constitutional challenge in *AAPC* and amended the TCPA's severability clause to provide: "If the government debt exception is deemed unconstitutional, then government debt collectors have retroactive liability for all past calls made pursuant to the exception." That provision would violate Due Process or the *Ex Post Facto* Clause, as it is a fundamental tenet of our Republic that conduct Congress expressly permits cannot be punished—much less subjected to both criminal and quasi-criminal, bankrupting monetary penalties. This is especially true in the First Amendment context, where the regulated conduct is not harmful in the traditional sense (unlike other conduct, such as assault or murder) and where there is constitutional permission to engage in the conduct (again, unlike other areas of regulated conduct, such as assault or murder).

Rather than acknowledge any of this, the panel in *Lindenbaum* simply held that *Landgraf* does not apply because the case's presumption against retroactive liability only constrains *legislative* exactments—not *judicial* "interpretations." App. 122a-123a. While a correct statement on its face, this reasoning evinces a fundamental misunderstanding of how *severance* works and from where the judiciary's power to sever derives. The judiciary's power to sever is entirely based on its interpretation of legislative intent, as constrained by the constitution. *See, e.g.*, *Ayotte v. Planned Parenthood of Northern New England*, 546

U.S. 320, 330 (2006) ("the touchstone" of the severability analysis "is legislative intent"). If the Sixth Circuit's understanding of severance were correct in the context of severing a conduct-*permitting* provision, courts would have more legislative power via severance than Congress, because they could impose retroactive liability, post-severance, regardless of its unconstitutional effect. *See Cunningham v. Matrix Fin. Svcs.*, 531 F. Supp. 3d 1164, 1174 n.9 (E.D. Tex. 2021) ("If the effects of judicial severability [in a case involving severance of an *exception* to liability] were to apply retroactively, the constitutional order would be in complete disarray. Congress—the creator of law—would face the steep presumption against retroactivity . . . while Article III tribunals would face no such obstacle," even though Article III tribunals' job in carrying out severance is to effect Congress's intent as constrained by the constitution); *see also Marks v. United States*, 430 U.S. 188, 191–92 (1977) (freedom from *ex post facto* liability is "protected against judicial action by the Due Process Clause of the Fifth Amendment."). That makes no sense, and it would blatantly violate separation of powers principles. The panel's absolutist position on severance cannot be right, and the Court should grant review to correct it.

Because Congress neither expressed a desire to impose retroactive liability nor could it have, the result is that the statute was unconstitutional from the time the amendment went into effect until the date of severance—which is the normal result in the case of an unconstitutional statute. Severance only saved this particular statute going forward because that is all Congress could have done by amendment or with the severability clause (and it is all we must presume Congress intended to do, under *Landgraf* and *Rivers*).

In *Sessions*, the Court reached a similar result, holding that whether severance is retroactive requires determining whether there are constitutional barriers to retroactivity, such as the violation of the constitutional rights of others (there, depriving other citizens of vested citizenship). *See* 137 S. Ct. at 1701. Thus, if constitutional rights would be violated by applying severance retroactively, it ***must*** operate prospectively. *Id.* (holding that "as the Government suggests, [the severed version of the statute] should apply, ***prospectively***") (emphasis added). That is the case here, because applying severance retroactively—*i.e.*, treating the government debt exception as if it never had any legal effect—would mean that government debt collectors are now liable for trillions of dollars in liability for calls made while those collectors believed (erroneously) that they were shieled from liability based on the government debt exception. Such an obviously unconstitutional result proves the Sixth Circuit's error.

B. Precedent from the Supreme Court and Other Circuits Confirms that Even Retroactive Severance Cannot Erase the Constitutional Harm Inflicted by an Unconstitutional Provision.

Even if severance of the conduct-permitting exception at issue were retroactive in an academic sense, it could not have erased the constitutional harm perpetrated while the unconstitutional provision was on the books. Just this past term, the Court again reaffirmed that "it is still possible for an unconstitutional provision to inflict compensable harm" despite the Court's severance of the unconstitutional provision. *See Collins v. Yellen*, 141 S. Ct. 1761, 1789 (2021) (after severing unconstitutional provision, remanding for lower court to address remedy and rejecting

legal fiction that unconstitutional law never actually existed); *see also United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987 (2021) (remedy for constitutional harm that occurred pre-severance must be "tailored" to the constitutional harms); *Seila Law*, 140 S. Ct. at 2196.

Further, in addition to conflicting with Supreme Court precedent, the Sixth Circuit's erroneous view of severance conflicts with the holdings of other Circuits. For example, in *Intercollegiate Broad. Sys. v. Copyright Royalty Board*, 684 F.3d 1332, 1340-42 (D.C. Cir. 2012), the Court severed removal protections for Copyright Royalty Judges because they violated the Appointments Clause, and *then vacated and remanded* the case to the lower court because there was an "Appointments Clause violation at the time of decision." In other words, the severance enacted by the court did not cure the litigants' subjection to an unconstitutionally appointed panel of copyright judges as if the unconstitutional provision never existed. *Id.*; *see also Arthrex, Inc. v. Smith & Nephew, Inc.*, 953 F.3d 760, 767 (Mem) (Fed. Cir. 2020) ("that the statute can be rendered constitutional by severance does not remedy any past harm—it only avoids continuing harm in the future") (O'Malley, J. concurring).

If judicial severance always operates retroactively such that it erases all constitutional harm that occurred when the pre-severance version of the statute was in effect, then the D.C. Circuit in *Intercollegiate* would not have needed to remand because the severance would have retroactively eliminated the unconstitutional removal restrictions, such that they never effected any constitutional harm to begin with. This, of course, makes no sense, as this Court has recognized time and again. *See, e.g.*, *Seila Law*, 140 S. Ct. at 2196;

Collins, 141 S. Ct. at 1789 (remanding case to address a remedy appropriate to the constitutional harm); *see also id*. at 1798, n.2 (rejecting position that "there was no [past] constitutional violation at all" due to retroactive severance as "foreign") (Gorsuch, J., concurring).

C. Applying "Fair Notice" to Spare Government Debt Collectors from Retroactive Liability Re-Creates the First Amendment Violation.

Nor can the application of fair notice solve these constitutional problems as the Sixth Circuit suggests. Even if the panel was correct about the fair notice doctrine enabling severance to be retroactive, the only way to ensure equal treatment during that time when government debt collectors were uniformly immune from liability under that doctrine because of the debt exception is to prosecute neither government debt collectors nor others for speech during the time the exception was on the books. Otherwise—if private actors could be prosecuted and government debt collectors are immune based on fair notice—the result is "the very same kind of content discrimination [the majority in *AAPC* says] we are seeking to eliminate"—favoring government speech over political and other speech. *See* 140 S. Ct. at 2365 (Gorsuch, J., joined by Thomas, J., concurring in part and dissenting in part)

And, further, theorizing that government debt collectors have a fair notice defense clearly is not sufficient to protect them from liability. That would mean government debt collectors are subject to billion-dollar class actions in which they would have to individually raise that defense and convince the court that they had no notice whatsoever that their conduct could be punished. This is why it must be decided at the *severability stage* whether the severance creates

constitutional barriers to retroactivity such that it must be prospective. *See Sessions*, 137 S. Ct. at 1701 (applying severance prospectively because applying it retroactively would create other constitutional problems that Congress would not and could not itself carry out). Thus, because it is constitutionally impermissible to hold government debt collectors liable for pre-*AAPC* violations of the robocall restriction, neither is it possible to hold Realgy liable during that period, because that unequal treatment violates the First Amendment, according to majority's core holding in *AAPC*.

D. The Sixth Circuit's Decision to Enforce a Content-Discriminatory Statute Conflicts with Supreme Court Precedent.

Consistent with the principle that retroactive severance is impermissible if it causes constitutional concerns, unanimous Supreme Court authority establishes that—regardless of whether a defendant violated the discriminatory law, whether the speech restriction was cured via legislative or judicial severance, and whether the restriction was a legal nullity that did not technically exist—liability cannot be imposed under a speech restriction that was, as a historical fact, unconstitutionally content-based at the time of the speech. *See, e.g.*, *Grayned*, 408 U.S. at 107 n.2; *Sessions*, 137 S. Ct. at 1699 n.24; *Schacht v. United States*, 398 U.S. 58, 63 (1970) (severing a content-discriminatory provision and reversing the conviction under that provision).

In *Sessions,* in the course of discussing judicial severance, the Court declared expressly that a defendant penalized under an unconstitutionally discriminatory law can attack that historical wrong without regard for how the legislature (or courts, in carrying

out legislative intent via severance) "might subsequently cure the infirmity." 137 S. Ct. at 1699 n.24. Thus, even if the judiciary carries out Congress's will by severing, a defendant can still challenge being prosecuted under that historically unconstitutional law. And the Court cited to *Grayned* in so holding. Years earlier, in *Grayned*, the Court reversed the conviction of a defendant who violated a content-discriminatory speech restriction, disclaiming the relevance of subsequent severance and the existence of a severability clause because a court "[n]ecessarily[] must consider the facial constitutionality of the ordinance in effect when [the defendant] was arrested and convicted." 408 U.S. at 107 n.2. If the Sixth Circuit's understanding of severance was correct, *Grayned* would have been decided differently and the conviction there would have stood. That did not occur.

The Sixth Circuit's decision did not address any of this contrary precedent or cite a single case where liability was imposed under a speech restriction that the Supreme Court deemed unconstitutionally content-based and discriminatory. App. 119a-126a. Nor could it have. *Lindenbaum* cannot be squared with the unanimous *Grayned* decision or the Court's precedents uniformly holding that such restrictions are unenforceable. *See id*., 408 U.S. at 107 n.2; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (reversing fine because election law discriminated on basis of content); *R.A.V.*, 505 U.S. at 396 (in reversing conviction for cross-burning because statute was content-discriminatory, though conduct at issue was otherwise proscribable, noting: "Let there be no mistake . . . that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without

adding the First Amendment to the fire."). This alone warrants review by the Court.

But worse, *Lindenbaum* carries additional disastrous consequences for free speech, as it means that government-favored debt-collectors will be forever exempt for their speech from 2015-20—under an unconstitutional speech regime—while all others are punished for theirs. The Court deemed this *exact* type of speech favoritism unconstitutional in *AAPC*. And if such an unconstitutional speech regime is permissible, the government has a constitutional loophole to pass flagrantly unconstitutional laws that serve its own political ends. Specifically, *Lindenbaum* authorizes legislatures to enact exceptions to the TCPA—or another statute—and then enforce that restriction against disfavored speakers until this Court cures the law via severance. Meanwhile, favored speakers would be exempt until the date of severance because they lacked fair notice their conduct was equally prohibited. As evidenced by the example of the pro-life protester, discussed *supra*, who is convicted under a content-discriminatory statute while the pro-choice protester is immune from liability, *Lindenbaum*'s reasoning is anathema to free speech, and it cannot be allowed to stand.

II. The Court Should Grant Certiorari to Resolve a Circuit Split on When Federal Judges are Required to Recuse Where They Stand to Benefit Personally.

A federal judge "shall disqualify [her]self in any proceeding in which [her] impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The law is thus clear that disqualification is required "'if a reasonable person who knew the circumstances would question the judge's impartiality, even though no

actual bias or prejudice has been shown.'" *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir. 2003). And, this Court has mandated recusal where an appellate judge has a direct, personal, or substantial connection to the outcome of the case. *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955) ("no man is permitted to try cases where he has an interest in the outcome"); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (concluding that judges should not preside over cases where they have a "direct, substantial pecuniary interest" in the outcome).

Judge Branstetter Stranch should have recused herself from serving on the Sixth Circuit panel due to the Branstetter Stranch firm's active and continuing prosecution of contingency fee TCPA litigation under the specific statutory provision at issue, and because she would benefit directly from reversal of the district court's order (or stated differently, would be directly harmed by affirming because that would have resulted in dismissal of lucrative contingency cases Branstetter Stranch was handling). App. 20a-23a. If a judge must recuse herself because her spouse owns a nominal amount of stock in one of the parties—even though a judicial decision almost never moves a company's stock—then surely Judge Stranch should have recused herself under the circumstances here, where the financial impact of a ruling in Realgy's favor would be much more significant, immediate, and far-reaching to Judge Stranch' spouse (and thus Judge Stranch herself). *Infra*, n. 2. Regardless of what this Court or Judge Stranch's colleagues might think, no *reasonable lay person* would think a judge would be capable of being impartial in such a circumstance, and that is the standard Congress chose.

In addition granting certiorari to review the refusal to recuse, the Court should also grant review to clarify and resolve a Circuit split regarding when recusal is required. Courts in other circuits have held that where "a relative within the proscribed proximity stands to benefit financially as a partner in a participating firm—even if the relative is not himself involved—[that] is sufficient to require recusal." *In re BellSouth Corp.*, 334 F. 3d 941, 944 (11th Cir. 2003); *see also Potashnick*, 609 F. 2d at 1113 ("We hold that when a partner in a law firm is related to a judge within the third degree, that partner will always be 'known by the judge to have an interest that could be substantially affected by the outcome' of a proceeding involving the partner's law firm."). The Sixth Circuit came to a different conclusion on facts even more appropriate for recusal, warranting this Court's granting of certiorari to resolve the circuit split on when recusal is warranted.

III. The Questions Presented Are Exceptionally Important.

Both questions presented are tremendously important and will have consequences far beyond this case. In *AAPC*, two Justices recognized that it would be impermissible under the First Amendment to "shield[] only government debt collectors from past liability under an admittedly unconstitutional law[.]" *See* 140 S. Ct. at 2366 (Gorsuch, J., joined by Thomas, J., concurring in part and dissenting in part). Yet that is precisely the holding that the Sixth Circuit adopted—at great cost to free speech. Consider just one of the myriad unjust and unconstitutional results *required*

based on the Sixth Circuit's reasoning: A consumer sues three defendants for calls in 2019: (1) a credit union for making one payment-reminder call per month to each of its 100,000 customers about private debt; (2) a vaccine manufacturer for making the same number of calls to notify people of free vaccines; and (3) a bank for making the same number of harassing calls to collect a government-backed student loan from the same customers. According to *Lindenbaum*, the bank would face no liability, but the credit union and vaccine manufacturer would face between $2.4 and $7.2 billion in liability for the same speech. The same result would follow in other even more egregious contexts, such as with the pro-life protestor, discussed *supra*.

The framers designed the First Amendment as a bulwark against "abridging the freedom of speech." U.S. Const. amend. I. Yet, according to the Sixth Circuit in *Lindenbaum*, the government can enact laws to favor its preferred speech—and such favoritism survives even a judicial decree that the restriction is unconstitutional. This Court's timely review is therefore imperative to correct the Sixth Circuit's errors and ensure that legislatures are not given free reign to bypass the First Amendment to serve their own political purposes. Further, the Court's recent cases involving severance have emphasized that severance does not cure constitutional harm, and in fashioning a remedy for a constitutional violation, courts must use an approach that is "tailored" to the violation, not one that re-creates it. *See Arthrex,* 141 S. Ct. at 1987-88 (severing section of statute insulting decisions of Patent Trial and Appeal Board from review by director, and remanding case to afford direct an "adequate opportunity for review."). As evidenced by *Lindenbaum*, the lower courts are inconsistently applying this doctrine, and this case provides the

perfect vehicle for the Court to clarify its parameters. *See AAPC,* 140 S. Ct. at 2354-55 ("To be sure, some equal-treatment cases can raise complex [severability] questions about whether it is appropriate to extend benefits or burdens, rather than nullifying the benefits or burdens . . . [T]here can [also] be due process, fair notice, or other independent constitutional barriers to extension of benefits or burdens."), 2366 ("Many have questioned the propriety of modern severability doctrine . . . and today's case illustrates some of the reasons why.") (Gorsuch, J., joined by Thomas, J., concurring in part and dissenting in part).

Equally important, the Court should address whether a federal judge is required to recuse herself under circumstances where she stands to reap a financial benefit by ruling in a particular way. The need to address this issue is particularly dire given it has recently come to light that judges are routinely (though often accidentally) flouting their mandatory recusal obligations.[2] And, it is more critical now than ever that judges avoid even the appearance of impropriety given the increasing numbers of Americans who presume judges are political actors who will vote according to their personal leanings and biases instead of faithfully applying the rule of law. Both issues are of paramount concern, and the Court can address them both within the same case.

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[2] *See* James V. Grimaldi et al., *131 Judges Broke the Law By Hearing Cases Where They Had a Financial Interest*, WALL ST. J., Sept. 28, 2021 9:08 am ET (https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-116328344 21).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully Submitted,

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December 8, 2021